MOTION FILED
NOV. 1 1999

(3)

No. 99-401

In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA AND PEACE AND FREEDOM PARTY, ET AL.,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA AND CALIFORNIANS FOR AN OPEN PRIMARY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

KENNETH P. JACOBUS
Counsel of Record

KENNETH P. JACOBUS, P.C.
425 G Street, Suite 920
Anchorage, Alaska 99501-2140
(907) 277-3333
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3088

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Republican Party of Alaska, Inc.; the Libertarian Party of Alaska; the Alaskan Independence Party; Wayne Anthony Ross; Mark Chryson and Linda S. McKay move for leave to file the attached brief amicus curiae requesting that the pending petition for certiorari be granted by this Court. The counsel for petitioners and for respondent Bill Jones, Secretary of State of California, have consented to the filing of this brief amicus curiae. The consent of the remaining respondents has been requested, but has not been obtained.

The interest of the proposed amici in this case is that they are presently litigating identical issues. They are all parties in *Ross v. State of Alaska*, ___ F.3d ___, 1999 WL 680345 (Ninth Circuit Docket No. 98-35720, decided September 2, 1999). In addition, the Republican Party of Alaska was an intervenor-defendant in *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), cert. den., *Republican Party of Alaska, Inc. v. State*, 520 U.S. 1209 (1996). *Ross v. State*, *O'Callaghan v. State*, and this petition involve the question of whether it is a violation of the First Amendment right of free political association for a state to require that political parties and their members must participate in a primary election in which registered members of any political party may freely participate in choosing the nominees of other political parties, as a condition of those nominees being placed on the general election ballot. The petitioners in this proceeding characterize the question as whether California's new blanket primary law – which allows voters of any political affiliation to cross party lines at will and to participate in the

selection of other parties' nominees – violates the First and Fourteenth Amendments to the United States Constitution. This is the same question, stated a bit differently. Any decision by this Court in this case will necessarily affect the rights and position of the amici, parties in *Ross v. State*.

The proposed amici are presently preparing their own petition for certiorari from the September 2, 1999, decision of the Court of Appeals for the Ninth Circuit in *Ross v. State*. This separate petition will be filed with this Court approximately November 10, 1999.

The purpose of this amicus brief is to advise the Court that this case is crucial to the political parties in Alaska, has an importance beyond its importance to the parties to this case, and that the issues presented by this case are ripe for review and should be reviewed at this time.

The acceptance by the Court of this amicus brief will provide it with additional important information as to why it is crucial that the petition for certiorari in this case be granted.

Respectfully submitted,

KENNETH P. JACOBUS
Counsel of Record

KENNETH P. JACOBUS, P.C.
425 G Street, Suite 920
Anchorage, Alaska 99501-2140
(907) 277-3333
Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
BRIEF AMICUS CURIAE	1
THE ISSUES INVOLVED ARE RIPE FOR REVIEW AT THIS TIME	2
THE ISSUES INVOLVED ARE CRUCIAL TO ALASKA, CALIFORNIA AND NATIONALLY ALASKA	6
CALIFORNIA	13
NATIONALLY	13
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Doyle v. State, F90-33 CV (D. Alaska 1990) 2

Grady v. State, Case No. 3AN-98-9720CI (Sup.Ct., 3rd Jud. Dist., Alaska, pending) 10

Marshall v. Meadows, 3:96CV208 (E.D. Va. 1996)..... 4

Marshall v. Meadows, 105 F.3d 904 (4th Cir. 1997) 6

Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) 4

O'Callaghan v. State, 914 P.2d 1250 (Alaska 1996)... 2, 3, 7

Republican Party of Alaska v. Metcalfe, Case No. 3AN-86-11714 (Sup.Ct., 3rd Jud. Dist., Alaska, 1986)..... 7

Republican Party of Alaska v. O'Callaghan, Supreme Court Docket No. 95-1962 .....4, 8

Ross v. State, A95-053 CI (HRH) (D. Alaska, 1998) 3, 5, 8

Ross v. State of Alaska, ___ F.3d ___, 1999 WL 680345 (Ninth Circuit Docket No. 98-35720, decided September 2, 1999).....2, 5

State v. Lindauer, Case No. 3AN-99-7041 CR (Sup.Ct., 3rd Jud. Dist., Alaska, pending) 11

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986)..... 2, 13, 14

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 13

Zawacki v. State, A92-414 (D. Alaska 1992).....2, 3

TABLE OF AUTHORITIES – Continued

Page

STATUTES

AS 15.25.040 et seq. 7

AS 15.25.030..... 7

MISCELLANEOUS

Stern, Gressma, Shapiro and Geller, *Supreme Court Practice, Seventh Edition*, Section 5.2 (1993) 4

BRIEF AMICUS CURIAE[1]

The First Amendment rights of the political parties are crucial to their very purpose and existence. One of the basic aspects of these rights is that political parties have the right to select their own candidates, with minimal interference from the states. Courts in both California and Alaska have nullified this right, however, by approving blanket primary elections. The political parties, and affected individuals, from both California and Alaska are now before this Court at the same time, seeking protection of their First Amendment right of free political association.

The situation in Alaska is different from the situation in California. For example, without limitation, (1) the blanket primary is new in California, but has a long history of problems in Alaska, (2) the blanket primary was adopted by the initiative in California and by the Legislature in Alaska, and (3) Alaska statutes dealing with the self-selection of candidates and party registration harm the Alaska political parties to a greater degree than the California statutes harm the California political parties. The proposed amici will present to this Court a position from a different perspective than the position which is presented by the California petitioners.

The petition for certiorari should be granted by this Court in this case. Also, certiorari should be granted in

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Ross v. State of Alaska, ___ F.3d ___, 1999 WL 680345 (Ninth Circuit Docket No. 98-35720, decided September 2, 1999) in which the petition will be filed shortly. The issues involved in these cases are crucial to the political processes in both Alaska and California, are important for the future development of the election processes in other states, and are ripe for review at this time.

THE ISSUES INVOLVED ARE RIPE FOR REVIEW AT THIS TIME

The Republican Party of Alaska (RPA) has objected to the blanket primary election in Alaska since 1990. In *Doyle v. State*, F90-33 CV (D. Alaska 1990), the District Court refused to order that the 1990 Alaska Republican primary election be conducted in accord with the RPA rule, and a blanket primary was used in 1990. In *Zawacki v. State*, A92-414 (D. Alaska 1992), the District Court announced a tentative decision that, under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Alaska blanket primary statute impermissibly infringed on the RPA's right to free political association. As a result, the 1992 and 1994 Republican primary elections were conducted in accord with the RPA rule, contrary to Alaska statute. In *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), the Supreme Court of Alaska held that the Alaska blanket primary statute did not impermissibly infringe on the RPA's right to free political association – a decision directly opposite to the decision of the U.S.

District Court in *Zawacki*.[2] As a result, the 1996 and 1998 Republican primary elections were conducted in accord with the Alaska statute, contrary to RPA rule.

In 1995, prior to participating in any way in *O'Callaghan v. State*, the RPA filed *Ross v. State*, A95-053 CI (HRH) (D. Alaska, 1998) in the U.S. District Court for Alaska, seeking a declaratory judgment and injunction requiring that the 1996 and future Republican primary elections be conducted in accord with the RPA rules. In 1997, the Libertarian Party of Alaska, the Alaskan Independence Party (AIP), and additional individuals joined *Ross v. State*, A95-053 CI (HRH) (D. Alaska, 1998). The Alaska blanket primary election was also contrary to the rules of these parties. The relief sought by all plaintiffs was a declaratory judgment that the parties, rather than the State of Alaska, had the right to determine the manner of selection of the party candidates to represent the parties in the general election, and an injunction requiring that future Alaska primary elections be conducted in accord with the party rules. *Ross v. State* was dismissed by the District Court on res judicata and lack of case or controversy grounds. This dismissal was affirmed by the Court of Appeals for the Ninth Circuit in *Ross v. State*, ___ ___ F.3d ___, 1999 WL 680345 (9th Cir. 1999).

---

[2] Justice Jay A. Rabinowitz, in a correct and well-reasoned dissent, would have placed the burden of proof on the State of Alaska to demonstrate compelling reasons for limiting the associational rights of the RPA. (914 P.2d 1264) The Court majority placed the burden of proof on the RPA to show a substantial burden to its associational rights, but refused the RPA any opportunity to make a factual record before the trial court. (914 P.2d 1250, fn. 16)

The RPA filed a petition for writ of certiorari from the decision of the Supreme Court of Alaska in *O'Callaghan v. State* on June 3, 1996, as *Republican Party of Alaska v. O'Callaghan*, Supreme Court Docket No. 95-1962. This petition for certiorari was denied on May 12, 1997, almost a year later. Under the practice of this Court, a petition for certiorari is ordinarily acted upon approximately six weeks after it has been filed, or about two or three weeks after the brief in opposition has been filed. Stern, Gressman, Shapiro and Geller, *Supreme Court Practice, Seventh Edition*, Section 5.2 at page 224 (1993). The *O'Callaghan* petition apparently had sufficient merit that this Court held it until almost the end of the term before ruling.

A petition for certiorari may be denied for various reasons, within the sound judicial discretion of this Court. The denial of the petition for certiorari in *O'Callaghan* appears to be a classic example of the judicial policy discussed by Justice Frankfurter in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950), as follows:

> It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

In its *O'Callaghan* petition for certiorari, the RPA informed this Court of three examples of pending and future litigation involving the same issues, as follows:

(1) *Virginia – Marshall v. Meadows*, 3:96CV208 (E.D. Va. 1996), pending at the time, involved a claim that Section 24.2-530 of the Code of Virginia was unconstitutional as an unlawful infringement on the right to associate freely with other citizens for the advancement of

shared political objectives, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The complaint alleged that the law of Virginia required the Republican Party of Virginia to open its primary nomination process to individuals who do not meet the party's qualification for participation in the selection of the party's candidates.

(2) *California* – In 1996, the voters of California adopted a blanket primary election. At that time, subsequent litigation by the California political parties was virtually certain. This subsequent litigation took place, and has resulted in this petition for certiorari presently before this Court.

(3) *Alaska – Ross v. State*, A95-053 CI (HRH) (D. Alaska, 1998) the action filed by the RPA to obtain a federal determination of its First Amendment associational rights, was pending at the time. The Libertarian Party of Alaska and the Alaskan Independence Party subsequently joined this action. This action resulted in *Ross v. State*, ___ F.3d ___, 1999 WL 680345 (9th Cir. 1999). A petition for certiorari from this decision will be filed with this Court in the near future.[3]

---

[3] The RPA also advised this Court that it intended to conduct a private mail-in primary election in 1996 to select its candidates for the general election. The RPA was not able to protect its rights in this way, however. Various factors, including existing laws, need for U.S. Department of Justice preclearance, time available, and costs, made it impossible for the RPA to implement this alternative.

In 1996, there was clearly going to be a substantial judicial record developed on the issues presently before this Court, and the case was not ripe for consideration. Now, this record has been developed. The Virginia case is now completed. There was no ruling on the merits. The case was dismissed for lack of standing, which dismissal was affirmed in *Marshall v. Meadows*, 105 F.3d 904, 906-907 (4th Cir. 1997). The parties in the California litigation are before this Court. The parties in the Alaska litigation will be before this Court directly. The issues are now ripe for resolution.

THE ISSUES INVOLVED ARE CRUCIAL TO ALASKA, CALIFORNIA AND NATIONALLY

Alaska

Voters form political parties in order to advance their political beliefs. The major method for the parties to do this is to select candidates who represent the beliefs and philosophies of the members, and secure the election of these candidates to public office. The First Amendment to the Constitution of the United States guarantees the people the right to advance their political beliefs in this manner. The law of Alaska severely and impermissibly infringes on the right of the people and political parties to do this.

The Alaska law applicable to the rights and abilities of Alaskan political parties to select their candidates to represent their interests can be summarized as follows:

(1) The parties have no control over who will run as party candidates in their own primary elections. These

candidates designate themselves as the party standard-bearers. (AS 15.25.030) A candidate may even change party registration on the same day as filing a declaration of candidacy.[4] The parties must allow these self-designated candidates to run under the party name, and cannot get rid of them even if they are totally unacceptable to the party.

(2) The parties have no control over who may vote in their primary elections. (*O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), AS 15.25.040. In the past, candidates representing political parties in the general elections have been selected by voters of opposing parties through cross-over voting.

(3) The parties cannot even protect the use of their own party names to avoid confusion and misrepresentation. (*Republican Party of Alaska v. Metcalfe*, Case No. 3AN-86-11714 (Sup.Ct., 3rd Jud. Dist., Alaska, 1986)) As a result, both the real Republican Party and a "Republican Moderate" party (supported in part by the Democrats), are now both ballot-qualified. Candidates of the Republican Moderate Party will appear for the first time on the 2000 Alaska primary and general election ballots in opposition to candidates of the real Republican Party.

---

[4] In fact, some years ago, Alaska had a candidate running for state office as a candidate of one of the major political parties. This candidate changed his party registration to that of the other major party ten minutes prior to the filing deadline, so that he could run for office as a member of the party that he secretly wanted to represent and so that he would have no opponent from the other party. Although extreme, this is typical of the mischief that is sometimes performed under the Alaska method of candidate selection.

The fact that the parties have no control over who may vote in their primary elections has been the subject of a decade of litigation in Alaska, and the litigation is continuing. Since the claims of the AIP and the Libertarian Party of Alaska in *Ross v. State* were dismissed for lack of case or controversy, they will be filing new litigation in the Alaska District Court to determine their rights for the 2000 primary and general elections. The RPA has lost a trial court action seeking to protect its exclusive use of the "Republican" designation. No Alaskan parties have specifically litigated the issue of self-selection of candidates. If the parties have no right to determine who their voters are going to be, then they will have to litigate the question of whether they have the right to select their candidates. Both of these issues are directly related. A decision by this Court dealing with the right of free political association as it applies to party selection of primary election voters is needed to control future litigation on that subject, and guide the parties in determining how to deal with the issue of candidate selection.

In its petition for certiorari in *Republican Party of Alaska v. O'Callaghan*, Supreme Court Docket No. 95-1962, the RPA cited several examples of how cross-over voting, allowed by the Alaska statutes, harmed the political parties in their right to choose their own candidates. These examples need not be repeated here. The problems did not exist during the 1992 and 1994 elections, which were conducted according to RPA rule. The 1996 elections were uneventful. The problems returned with a vengeance in the 1998 elections, however, for both the RPA and the AIP.

The winner of the AIP primary election for governor was Sylvia Sullivan. Ms. Sullivan was a Democrat, who changed her party registration to AIP solely for the purpose of running for governor as an AIP candidate. She would not subscribe to the platform and beliefs of the AIP, and would not even attend AIP meetings. The AIP objected to Ms. Sullivan as its candidate, refused to endorse her, and actually endorsed the Republican candidate, John Lindauer. Voters of other political parties assisted in the victory of a Democrat in the AIP gubernatorial primary. The AIP objected, and continues to object, to the blanket primary election system which selected Ms. Sullivan, a Democrat, as its gubernatorial candidate.

The RPA had a much more serious problem. In 1998, John Lindauer came to Alaska with millions of dollars in Chicago money to buy the governorship. He decided to run for governor as a Republican. In the past, he had run for governor as an AIP candidate.

The major candidates in the Republican gubernatorial primary election were John Lindauer, Robin Taylor, and Wayne Ross. Mr. Taylor and Mr. Ross were conservative Republicans who had been active in the Republican Party for many years. Mr. Taylor is a State Senator and Mr. Ross was a member of the Republican National Committee. Mr. Lindauer had access to out-of-state money and was able to spend millions of dollars on his campaign. Mr. Ross and Mr. Taylor had difficulty raising money because of the Alaskan Campaign Finance Reform Act, and could not compete financially with Mr. Lindauer. In addition, Ross and Taylor split the conservative Republican vote. Mr. Lindauer was selected as the

Republican candidate. He would have lost to either Mr. Ross or Mr. Taylor had only one of them been running.

In this Republican primary election, a classic cross-over voting situation existed. The Democrats had one strong candidate running in the Democrat gubernatorial primary election. His victory was certain. Mr. Lindauer was known to be the Republican candidate who the Democrats could defeat most easily. Cross-over voting took place in the Republican primary, which assisted in the victory of Mr. Lindauer, although it cannot be said that this was the only reason that Mr. Lindauer won the Republican gubernatorial primary.

Once Mr. Lindauer won the Republican primary, his candidacy began to disintegrate almost immediately over questions relating to his residence, the source of his money and his continued lying. Chuck Achberger, a former employee of the Lindauer campaign, filed a complaint with the Alaska Public Offices Commission, over Mr. Lindauer's finances and his required reporting. An independent voter, Frances Grady, filed a lawsuit in the Alaska Superior Court, dealing with the same issues. (*Grady v. State*, Case No. 3AN-98-9720 CI (Sup.Ct. 3rd Jud. Dist., Alaska, pending)) Both these complaints requested that Mr. Lindauer's name be removed from the general election ballot. Neither the Alaska Public Offices Commission or the court resolved the proceedings before them prior to the 1998 general election.

The disintegration of the Lindauer campaign affected not only his campaign, but also the campaigns of Republican candidates across the board. It also affected the credibility and integrity of the Republican Party itself.

Fewer than two weeks prior to the general election, after some weeks of the only issue being "Lindauer", the RPA Party accepted the fact that it had to write-off any chance to elect a Republican governor in 1998. The RPA had to disavow Mr. Lindauer in order to save the party from a massive defeat across the entire spectrum of elective offices. The RPA withdrew its endorsement from Mr. Lindauer and recommended that voters write-in Mr. Taylor for governor. Mr. Taylor received the second-highest number of votes in the Republican gubernatorial primary. The Republican Party of Alaska had never before been forced to withdraw an endorsement of its gubernatorial candidate in a general election. The RPA objected and continues to object to a statutorily-mandated election process which forces it to accept a candidate such as Mr. Lindauer as its standard-bearer in the general election.[5]

The rules of the RPA, the AIP, and the Libertarian Party of Alaska continue to be in conflict with the Alaska blanket primary statute.[6] These parties, plus others, will

---

[5] After the 1998 general election, the Alaska Public Offices Commission, in ruling on the Achberger complaint, found numerous campaign law violations and referred the Lindauer matter to the Attorney General's office to consider criminal prosecution. In August, 1999, the Attorney General of Alaska filed a complaint charging Mr. Lindauer with twenty-three (23) violations of law which occurred during his campaign, including twenty-two (22) class A misdemeanors and one felony. *State v. Lindauer*, Case No. 3AN-99-7041 CR (Sup.Ct., 3rd Jud. Dist., Alaska, pending). This criminal complaint is still pending.

[6] The RPA has an additional problem. After the *O'Callaghan* decision, the Republican National Convention adopted National Rule 34(f), which reads as follows:

have candidates on the primary and general election ballots in 2000. The problems caused by the conflict between the party rules and the Alaska blanket primary statute will arise again in 2000, and every two years thereafter. Litigation will continue. However, the factual situation is

---

> Rule 34(f) – On or after January 1, 1997, no state law or party rule shall be observed that allows persons who have participated or are participating in the selection of any nominee of a party other than the Republican Party, including, but not limited to, through the use of a multi-party primary or similar type ballot, to participate in the selection of a nominee of the Republican Party for that general election. No person nominated in violation of this rule shall be recognized as the nominee of the Republican Party. If state law or state party rule provides for the selection of the nominee of the Republican Party in violation of this rule, the Republican nominee shall be selected by a convention convened and held under the provisions of Rule No. 32(c), unless a state party rule provides specifically to the contrary.

This rule is binding on the RPA, and could prevent any Republican candidate from being placed on the general election ballot in Alaska for the 1998 and future elections. In fact, the rule was not enforced against the RPA for the 1998 general election, but still remains effective for possible enforcement against it in the future. If it is enforced, the RPA will not be able to run *any* candidates under the Republican name in the future. Individuals will still have the right to usurp the Republican name under Alaska law, however. Individuals to whom the party objects will be able to run as Republicans, but the RPA will not be able to use the Republican name to support candidates whom it deems worthy of support.

different each time, and by the time the facts have developed, it becomes impossible to obtain relief for a particular election because of lack of time.

It is the parties' understanding that this Court has recently reaffirmed the vitality of *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and that the parties have the right to select their standard-bearers. (*Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)) However, as discussed by Justice Rabinowitz in his dissent in *O'Callaghan*, the principles of *Tashjian* are being ignored in Alaska.

The Alaskan political parties and their members need relief in the form of a final federal decision interpreting and protecting the federal Constitutional right of free political association. This is needed now in order to know the law applicable to determination of who may vote in future primary elections, and to make a determination as to how to deal with the related issue of the parties' inability to select their own candidates.

California

In their petition for certiorari, the California petitioners have clearly pointed out why a decision is needed to protect the rights of the California parties, in particular the minor parties. The proposed amici concur with the views expressed in this petition.

Nationally

California is one of the most important states of the United States. For better or worse, trends and ideas

which begin in California often spread across a large part of the country. The use of the initiative or legislative process to impose blanket primary elections in other states is one of these ideas and trends which can be expected to spread.

Arguments in favor of a blanket primary are very seductive, and the actual effect of the process is greatly misunderstood. For example, in the face of declining voter participation in the political process in the United States, proponents of a blanket primary will argue that people will be more interested in and will participate in the political process because they will be able to "vote for the person and not the party." Voters will be told that they will have more input into the political process. In fact, a blanket primary will remove much of the power from the voters to implement any policy or program. Since the candidate is not responsible to a group of voters with a coherent philosophy or program, but is elected by an amorphous group of people of various motivations, the office-holder will not represent any philosophy or program of anyone, but will have to try to please everyone in order to be reelected. This does not result in good government by and for the people.

There are very real problems with the blanket primary system, which are well-recognized, such as raiding and lack of accountability to voters. Additionally, the blanket primary system is unquestionably a serious infringement on the First Amendment right of free political association. Finally, under *Tashjian*, it appears that the blanket primary system is impermissible if contrary to the rules of the political party upon which the state desires to impose the system.

Before this system spreads any further, over the objections of the affected political parties and individuals, the issues involved and the applicable parameters need to be determined by this Court. It is bad enough that there has been a decade of litigation in Alaska, and that litigation has been filed in California immediately upon the implementation of the blanket primary system. If there is no resolution of the issues and parameters at this time, the system can be expected to spread into additional states with additional uncertainty and litigation. There is no advantage or public interest in allowing this to happen.

CONCLUSION

For the reasons set forth in the petition for certiorari and this brief amicus curiae, the petition for certiorari should be granted.

Respectfully submitted,

KENNETH P. JACOBUS
Counsel of Record

KENNETH P. JACOBUS, P.C.
425 G Street, Suite 920
Anchorage, Alaska 99501-2140
(907) 277-3333

Counsel for Amici Curiae